No. 87-914

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

MICHAEL ZERNICEK,

Petitioner,

v.

PETROLEOS MEXICANOS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petroleos Mexicanos ("Pemex") files this Brief in Opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act of 1976 ("the Act" or "the FSIA") does not grant subject matter jurisdiction to the district court in actions brought against a

foreign sovereign for personal injuries suffered by a citizen of the United States outside the territory of the United States, even where the effects of the injury linger after the individual has returned to the United States. The decisions below to that effect are in accord with a uniform body of case law construing and applying the Act. The findings of the District Court is affirmed by the Court of Appeals that Pemex had not waived its sovereign immunity is supported by the record. Accordingly, there is no substantial question of law which would justify the grant of a writ of certiorari in this case.

ARGUMENT

I. Zernicek's Claimed Injury Suffered in Mexican Territorial Waters Does Not Constitute a Direct Effect in the United States Under 28 U.S.C. § 1605(a)(2)

Zernicek brought this action against his employer, Brown & Root, Inc., Pemex, and two Mexican business entities, Rayos X Industrial de Mexico S.A. ("Rayos X") and Corporacion de Construcciones de Campeche S.A. de C.V. ("CCC") claiming that he suffered from exposure to radioactive materials used by Rayos X in welding inspection equipment. The events about which Zernicek complains occurred in and around offshore oil production platforms being constructed by Pemex in the Bay of Campeche in the territorial waters of the United Mexican States. Zernicek settled with his employer and CCC. A default judgment was entered against Rayos X, leaving Pemex

as the remaining defendant. After a full trial the District Court dismissed Zernicek's claim against Pemex for want of subject matter and *in personam* jurisdiction under the Foreign Sovereign Immunities Act of 1976. 90 Stat. 2892.

The FSIA created a comprehensive and exclusive statutory scheme for regulating jurisdiction of federal courts in actions brought against foreign sovereigns. 28 U.S.C. § 1602; H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), *reprinted* in 1976 U.S. Code Cong. & Admin. News 6604 ("House Report"). The basic grant of subject matter jurisdiction is codified at 28 U.S.C. § 1330(a). The Act provides a general rule of immunity to foreign states except as otherwise provided in the Act. 28 U.S.C. § 1604. The statute grants subject matter jurisdiction to the district courts only with respect to claims brought against a foreign state where the foreign state is not entitled to immunity under other provisions of the FSIA or applicable international agreement. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 489, 76 L.Ed.2d 81, 89, 103 S.Ct. 1962 (1983). Zernicek asserts that the general rule of immunity is not applicable in this case because of the so called "direct effect" exception set forth in 28 U.S.C. § 1605(a)(2):

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> • • •
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

Zernicek's claim is based upon events occurring in the Bay of Campeche in Mexican territorial waters. For purposes of this case Pemex has conceded that its activities relative to this case were commercial in nature. Thus, the only contested issue with respect to the "direct effect" exception in § 1605(a)(2) is whether the "act[s] outside the territory of the United States" "cause[d] a direct effect in the United States."

Since enactment of the FSIA in 1976 the "direct effect" clause of § 1605(a)(2) has been interpreted and applied in numerous cases brought by United States citizens for personal injury or death suffered from events occurring outside of the United States. The courts have uniformly held in these cases that 28 U.S.C. § 1605(a)(2) does not provide an applicable exception to the general rule of immunity, even if the injury lingers after the injured person returns to the United States. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3rd Cir. 1980); *Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578, 586 (E.D.Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3rd Cir.), cert. denied, — U.S. —, 107 S.Ct. 578, 93 L.Ed.2d 581 (1986); *Close v. American Airlines, Inc.*, 578 F.Supp. 1062, 1064-65 (S.D.N.Y. 1984); *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C.), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); *Berkowitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035, 105 S.Ct. 510, 83 L.Ed.2d 401 (1984); *Harris v. VAO Intourist*, 481 F.Supp. 1056, 1065 (E.D.N.Y. 1979).

The decisions carry out the Congressional intent to provide a uniform set of guidelines for adjudicating claims

of foreign states to immunity. House Report at 13. The decisions of the District Court and Court of Appeals below are in line in all respects with the analysis and results in this uniform body of case law.

Zernicek urges a departure from the settled interpretation of the direct effect clause in § 1605(a) because of a claimed discriminatory treatment by the Courts when applying the direct effect clause in § 1605(a)(2) in actions brought by individual as opposed to corporate claimants. Setting aside the question of whether there is any rational basis for distinguishing between claims for personal injury and claims for commercial loss, Zernicek's argument is not persuasive because no such corporate-individual differentiation exists. Indeed, in the cases cited by Zernicek the Courts have explicitly recognized that the results in the personal injury cases are in harmony with the cases in which injury occurs to corporate interests. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-1112 (5th Cir. 1985). Accordingly, there is no basis for further review of the decisions below.

II. The Record Supports the Findings of the Courts Below that Pemex Did Not Waive Its Soverign Immunity

Zernicek asserts that the Courts below erred in finding that Pemex had not waived its sovereign immunity. Waiver is one of the enumerated exceptions to the general

rule of immunity. 28 U.S.C. § 1605(a)(1). Zernicek's waiver claim is based upon the fact that Pemex entered into a construction contract with CCC, a Mexican contractor, and CCC contemporaneously entered into a subcontract with Brown & Root, Inc., Zernicek's employers. The Pemex-CCC contract specified that the contract was to be governed by Mexican law with Mexican courts having exclusive jurisdiction over any disputes involving Pemex. The CCC/Brown & Root contract specified that that contract would be governed by Texas law and that Texas courts would have jurisidiction over any CCC/Brown & Root disputes.

The District Court found that the existence of these two contracts did not evidence an intent by Pemex to waive its immunity and did not evidence an implicit waiver of immunity. The Court of Appeals affirmed these findings. Zernicek challenges these findings as being contrary to the holding in *Proycefin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390 (2d Cir. 1985). However, in *Proyecfin* the foreign sovereign was signatory to the contract waiving immunity. *Id.* at 393 n.2. In contrast the only contract signed by Pemex contained no express waiver of immunity and provided that the laws of Mexico would apply to the contract and that Mexican courts would have exclusive jurisdiction over cases in which Pemex was a party. Accordingly, *Proyecfin* has no application to this case and there is no basis for disturbing the findings below that Pemex did not waive its sovereign immunity.

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CONCLUSION

The Courts below correctly decided the jurisdictional issues in accord with well-settled principles codified in the FSIA and consistently applied in a uniform body of case law. There is no basis for granting a writ of certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

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